

154 FERC ¶ 61,054
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

PJM Interconnection, L.L.C.

Docket No. ER16-429-000

ORDER ACCEPTING PROPOSED AGREEMENT

(Issued January 29, 2016)

1. On November 30, 2015, PJM Interconnection, L.L.C. (PJM) submitted, pursuant to section 205 of the Federal Power Act (FPA)¹ an executed designated entity agreement (Agreement) entered into between PJM and Northeast Transmission Development, LLC (NTD)² to provide for the construction of a portion of the Artificial Island Project. In this order, we accept the Agreement as filed, effective October 29, 2015, as requested.

I. Background

2. NTD is an affiliate of LSP Transmission Holdings, LLC, a nonincumbent transmission developer.³ NTD was one of seven entities who together submitted a total of 26 proposals in response to PJM's regional transmission expansion plan (RTEP) window seeking solutions to improve operational performance on bulk electric system facilities in the southern New Jersey Artificial Island area—a process which began in 2013.⁴ PJM selected NTD's proposal after an extensive competitive evaluative process,

¹ 16 U.S.C. § 824d (2012).

² PJM Interconnection, L.L.C., PJM Service Agreements Tariff, [PJM SA No. 4310, PJM SA No. 4310 among PJM and Northeast Transmission, 0.0.0.](#)

³ PJM November 30, 2015 Filing (Transmittal) at 2.

⁴ *Id.* at 2.

a portion of which was overseen by a Commission-appointed administrative law judge.⁵ On July 28, 2015, the PJM Board of Managers approved baseline upgrades b2633.1 and b2633.2 for inclusion in the PJM RTEP for cost allocation purposes and notified NTD that, as the proposal's sponsor, it would be the Designated Entity⁶ for those portions of the Artificial Island Project (Project).⁷ PJM states that it is filing the Agreement with the Commission because it contains non-standard terms and conditions not included in the *pro forma* Designated Entity Agreement.⁸

3. NTD will construct a 230 kV transmission line which will cross the Delaware River, either overhead or submarine, and connect incumbent transmission owner PSE&G's existing Salem substation to a new Silver Run substation,⁹ tapping into existing 230 kV transmission lines owned by incumbent transmission owner DPL.¹⁰

II. PJM's Filing

4. PJM states the Agreement designates NTD responsibility for the construction, ownership, and financing of the Project, and sets out milestone dates for the Project, including an in service date on or before June 1, 2019.¹¹ PJM explains the Agreement

⁵ *Id.* at 3. The Commission's Administrative Law Judge Steven L. Sterner presided over meetings between PJM and each of the four final bidders. *See* Artificial Island Order 1000 Transmission Solicitation, Report, Docket No. MD14-1-000 (Dec. 3, 2014).

⁶ A Designated Entity is designated responsibility for the construction, ownership, and/or financing of transmission enhancements and expansions approved by the PJM Board for inclusion in the RTEP. Transmittal at 4.

⁷ Public Service Electric and Gas Company (PSE&G) and Delmarva Power & Light Company (DPL) are also assigned construction responsibility for other portions of the Artificial Island Project.

⁸ Transmittal at 1-2.

⁹ Baseline upgrade b2633.1 includes construction of a new transmission line between Salem and the new Silver Run substation. Baseline upgrade b2633.2 includes construction of the new Silver Run 230 kV substation. *Id.* at 4.

¹⁰ Proposed Agreement, Schedule A (Description of the Project), Schedule B (Scope of Work).

¹¹ Transmittal at 4.

also requires NTD submit required security in the amount of \$5,830,050, and states that NTD has done so.¹²

5. The Agreement includes a non-standard provision creating a cap on “Construction Costs” to be the lesser of actual costs or a Construction Cost Cap amount of \$146 million, adjusted for escalation using the Handy-Whitman Index. Schedule E of the Agreement defines Construction Costs included under the \$146 million cap as:

“any and all costs and expenses directly or indirectly incurred by NTD to develop, construct, complete, start-up and commission the Project and place the Project in service in accordance with Schedule B, including without limitation any costs and expenses incurred by NTD in connection with the following, in each case as and to the extent contemplated by the Schedule B: (i) obtaining permits and other governmental approvals for the Project, (ii) acquiring land and land rights for the Project, (iii) performing any environmental assessments or environmental mitigation activities in connection with the Project, (iv) designing and engineering the Project, (v) procuring any equipment, supplies and other materials required to complete construction of the Project and place the Project in service, (vi) otherwise performing or completing any and all development and construction-related activities required in connection with the Project as part of the Schedule B, including but not limited to all site clearing, equipment assembly and erection, testing and commissioning activities contemplated by the Schedule B, whether performed directly by NTD or by one or more third parties retained by NTD (without regard to whether such third parties are affiliated or non-affiliated), but excluding in all cases Excluded Costs.”¹³

6. Schedule E of the Agreement also defines “Excluded Costs,” which are not limited under the Construction Cost Cap, as:

“(i) any taxes, (ii) any financing costs, including any approved return on equity, Allowance for Funds Used During Construction, or similar allowance or financing cost or charge earned or accrued in connection with the Project during the period of development and construction of the Project (or thereafter), (iii) any costs and expenses associated with any PJM directed

¹² *Id.*

¹³ Proposed Agreement, Schedule E, Section 1.2c.

additions to or modifications of the Scope of Work (but only if and to the extent such costs and expenses are in excess of the costs and expenses that would have been incurred but for such addition to or modification of the Scope of Work), (iv) any costs and expenses incurred as a result of an Uncontrollable Force (but only if and to the extent such costs and expenses are in excess of the costs and expenses that would have been incurred but for such Uncontrollable Force) and (v) any costs and expenses associated with the operation and maintenance of the Project.”¹⁴

7. Schedule E defines further “Uncontrollable Force” as:

“(i) any destruction of or damage to any portion of the Project, or any interruption, suspension or interference with NTD’s (or any contractor’s or subcontractor’s) performance of activities required to complete the Project, which destruction, damage, interruption, suspension or interference is caused by landslides; lightning; earthquakes; hurricanes; tornadoes; typhoons; severe weather; fires or explosions; floods; epidemic; acts of a public enemy; acts or threats of terrorism; wars; blockades; riots; rebellions; sabotage; vandalism; insurrections; environmental contamination or damage not caused by NTD (or any contractor or subcontractor); strike or labor disruption or civil disturbances (or governmental actions arising from any of the foregoing), (ii) any material change in the enforcement, interpretation or application of any statute, rule, regulation, order or other applicable law existing as of the Effective Date or the issuance or enactment of any of the foregoing on or after the Effective Date, (iii) any Breach or Default by Transmission Provider of its obligations under this Designated Entity Agreement or any request by Transmission Provider to delay or suspend any activities associated with the Project, or (iv) any Breach or Default, by any Transmission Owner under or in connection with an Interconnection Coordination Agreement or any interconnection agreement.”¹⁵

8. PJM states it has reviewed the nonconforming provisions and believes they are consistent with the construction cost commitment proposal that NTD submitted during

¹⁴ Proposed Agreement, Schedule E, Section 1.2e.

¹⁵ Proposed Agreement, Schedule E, 1.2g.

the evaluation process. PJM also notes that it selected NTD's proposal in part because of its construction cost cap.¹⁶

9. Finally, PJM requests waiver of the Commission's 60-day prior notice requirements to allow an effective date of October 29, 2015. PJM states the waiver is appropriate because the Agreement was filed within 30 days of the requested effective date.¹⁷

III. Notice of Filing and Responsive Pleadings

10. Notice of the filing was published in the *Federal Register*, 80 Fed. Reg. 76,014 (2015), with interventions and protests due on or before December 21, 2015. NTD, American Electric Power Service Corporation,¹⁸ NextEra Energy Transmission, LLC, and PSE&G filed timely motions to intervene. PSE&G also filed a protest.

11. On January 8, 2016 and January 11, 2016, respectively, NTD and PJM each filed a motion for leave to answer and an answer to PSE&G's protest. On January 27, 2016, PSE&G filed a motion for leave to answer and answer to NTD's and PJM's answers.

A. PSE&G's Protest

12. PSE&G asserts in its protest that the cost containment provisions of the Agreement fail to provide adequate protections to PJM, and in turn, to PJM customers.¹⁹ PSE&G objects to the provision that would adjust the Construction Cost Cap amount for escalation, arguing that NTD "would be entitled to escalation based on an index, whether or not its costs actually increased" and "even though its own acts or omission pushed its work into a later and more expensive period based on the index."²⁰ In addition, PSE&G

¹⁶ Transmittal at 5-6.

¹⁷ *Id.* at 6.

¹⁸ On behalf of its affiliates: Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Wheeling Power Company, AEP Appalachian Transmission Company, AEP Indiana Michigan Transmission Company, AEP Kentucky Transmission Company, AEP Ohio Transmission Company, and AEP West Virginia Transmission Company, and Transource Energy, LLC.

¹⁹ PSE&G December 21, 2015 Protest (PSE&G Protest) at 5.

²⁰ *Id.* at 6.

argues the escalation provision would be difficult to administer, citing uncertainty regarding whether escalation is calculated on planned or actual expenditures as support. PSE&G also objects to the exclusion of taxes and financing costs from the cost cap.²¹

13. PSE&G further argues that the Uncontrollable Force provision was not included in NTD's proposal prior to its selection, and that it is too broad as compared to the Force Majeure provision of the Agreement,²² which conforms to that of the *pro forma* Designated Entity Agreement. PSE&G contends that the definition of Force Majeure in the Agreement explicitly states that it does not include "a failure of performance that is due to an affected party's own negligence or intentional wrongdoing." PSE&G argues that the Agreement's Uncontrollable Force provision does not contain similar language, and, therefore, NTD would be able to recover costs due its negligence or poor performance outside of the Construction Cost Cap.²³ PSE&G further explains that NTD could not only recover the costs of, for example, storm damage for which it failed to plan, but it would also be entitled to a time extension for delays related to such storm damage.²⁴

²¹ *Id.*

²² Force Majeure is defined in the Agreement as "any cause beyond the control of the affected Party, including but not restricted to, acts of God, flood, drought, earthquake, storm, fire, lightening, epidemic, war, riot, civil disturbance or disobedience, labor dispute, labor or material shortage, sabotage, acts of public enemy, explosions, orders, regulations or restrictions imposed by governmental, military, or lawfully established civilian authorities, which in any foregoing cases, by exercise of due diligence, it has been unable to overcome. An event of force majeure does not include: (i) a failure of performance that is due to an affected Party's own negligence or intentional wrongdoing; (ii) any removable or remedial causes (other than settlement of a strike or labor dispute) which an affected Party fails to remove or remedy within a reasonable time; or (iii) economic hardship of an affected Party." Proposed Agreement, Article 10.0 (Force Majeure).

²³ PSE&G Protest at 6-8.

²⁴ *Id.*

14. PSE&G further claims the inclusion of “material change in the enforcement, interpretation or application of any statute, rule, regulation, order or other applicable law existing as of [contract signing]...” in the Uncontrollable Force provision is overly broad and could be applied to any adverse action by a regulatory agency affecting NTD.²⁵

15. Finally, PSE&G argues that PJM treated NTD preferentially by allowing NTD to alter the provisions of its proposal after accepting it, such that the terms of the Agreement do not conform to the proposal PJM accepted. Specifically, PSE&G claims NTD’s proposed Cost Cap initially only applied to NTD’s November 4, 2013 Detailed Constructability Submittal, and that additions to or modifications of that Submittal would therefore have been excluded from the Cost Cap. PSE&G contends the Agreement improves upon that proposal and that other bidders should have been provided a comparable opportunity to improve upon their proposals.²⁶ PSE&G further argues this is indicative of a wider need for consistent standards to evaluate cost cap proposals to ensure equitable treatment and that cost cap commitments are enforceable.²⁷

B. Answers

16. NTD states in its answer that PSE&G’s objections to the Artificial Island solicitation process are outside of the scope of this proceeding.²⁸ NTD states that PSE&G’s protests are substantially similar to those made during the PJM Stakeholder process resulting in NTD’s selection, and that PJM nonetheless held that the Construction Cost Cap that NTD presented and that was incorporated into the Agreement “provides greater cost certainty with fewer exclusions to cost commitment compared to the other proposals.”²⁹ PJM states PSE&G’s assertion that NTD was allowed to improve its Cost Cap proposal while competing bidders were not is incorrect.³⁰ PJM states that PSE&G’s

²⁵ *Id.* at 8.

²⁶ *Id.* at 9-11.

²⁷ *Id.* at 3, 11.

²⁸ NTD January 8, 2016 Answer (NTD Answer) at 2. NTD also states that PSE&G’s assertion that PJM’s evaluation process was unfair because it provided NTD opportunities not provided to other finalist bidders is false. *Id.* at 7.

²⁹ *Id.* at 3 (citing the Artificial Island Project Recommendation White Paper at 3).

³⁰ PJM January 11, 2016 Answer (PJM Answer) at 5.

criticism of new language contained in the Agreement ignores the fact that the additional language was an attempt to clarify the scope of work included under the Cost Cap.³¹

17. NTD states that PSE&G's criticisms of the Construction Cost Cap as inadequate ignore that the alternative would be an uncapped scenario where customers would bear all costs, which NTD notes is the case for PSE&G's portion of the selected Artificial Island solution and with respect to the Commission-approved *pro forma* Designated Entity Agreement, which contains no cost caps. NTD argues PSE&G cannot demonstrate the Construction Cost Cap in the Agreement is not just and reasonable, because it provides additional ratepayer protection.³²

18. NTD states PSE&G's criticism of the Construction Cost Cap's potential escalation and exclusion of taxes and financing costs ignore that these aspects of the cap were clearly noted during the stakeholder process, reflected PJM's own practice in excluding these factors from its estimates of project costs, and were accepted by PJM.³³ PJM states that it considered PSE&G's criticisms in its protest as to the scope of the Uncontrollable Force term, the escalation clause, and the exclusion of taxes and financing costs, and concluded that NTD's proposal, with the cost cap, was in totality the more efficient or cost-effective solution compared to those of the other four project finalists.³⁴

19. NTD states PSE&G's assertions that the Uncontrollable Force provision is less restrictive than Force Majeure is false, stating, rather, that the Uncontrollable Force provision only applies to items stated within the definition and that are outside of NTD's control, while the Force Majeure term applies to "any cause beyond the control of the affected Party."³⁵ NTD also states the Uncontrollable Force provision does not address NTD's own negligence or intentional wrongdoing because it includes only issues that could not be caused by NTD. NTD notes that the Agreement requires NTD to attempt to mitigate the impacts of an Uncontrollable Force, and states that the Commission's

³¹ *Id.* at 7-8.

³² NTD Answer at 3-4.

³³ *Id.* at 4-5.

³⁴ PJM Answer at 8.

³⁵ NTD Answer at 5.

prudence review of costs of the project provides an additional check against costs related to NTD's negligence or willful misconduct.³⁶

20. NTD states that the provision's exception for changes in law is limited in scope and, despite PSE&G's assertion, would exclude failure to obtain a permit for any reason.³⁷

21. PJM states that PSE&G's protest raises the need for Commission guidance as to how the Commission perceives its role in reviewing cost containment provisions that transmission developers offer in Order No. 1000 competitive solicitation processes, including whether it will approve the substantive terms of cost containment provisions through non-conforming terms of a Designated Entity Agreement, such as NTD's filing, and the standard of review that the Commission will apply in considering such cost containment provisions. PJM urges the Commission to evaluate cost containment provisions through filings such as NTD's, and to clarify that it will evaluate whether a cost containment provision is reasonable as one component of the overall Order No. 1000 process, rather than by closely examining the precise content of cost containment provisions.³⁸

22. PJM urges the Commission to consider the overall reasonableness of the cost containment provisions and its exceptions, and defer evaluation of specific hypothetical applications of those provisions until they actually occur.³⁹ PJM also states that Commission guidance is needed on PSE&G's concerns regarding the enforceability of costs caps, and opines that ratepayers should have standing to challenge recovery of costs they believe are outside the cap.⁴⁰

23. PSE&G states in its January 27, 2016 answer that the cost cap provisions of the Agreement contain non-standard commercial terms that raise questions about NTD's commitment. PSE&G reiterates that the preparation of the Agreement provided NTD with an opportunity, not available to other participants, to modify its cost cap. PSE&G

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ PJM Answer at 2.

³⁹ *Id.* 4.

⁴⁰ *Id.* 9.

repeats that PJM's future procurements should implement process improvements to ensure fair application of all open window process rules to participating bidders.

IV. Discussion

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make NTD, American Electric Power Service Corporation, NextEra Energy Transmission, LLC, and PSE&G parties to this proceeding.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept NTD's, PJM's, and PSE&G's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

26. We accept the Agreement as filed, effective October 29, 2015, as requested. Waiver of the Commission's notice requirements pursuant to section 35.11 of the Commission's regulations⁴¹ is granted.⁴²

27. The issue before the Commission in the instant proceeding is whether the Agreement providing for the development and construction of the Project is just and reasonable. Matters pertaining to PJM's RTEP process or generic policy on evaluating competitive transmission proposals are not appropriately before the Commission in this proceeding, as such issues were previously addressed in the Commission's decision in *Pub Serv. Elec. and Gas Co. v. PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,229 (2015). Therefore, PSE&G's protests pertaining to that process or policy are outside the scope of this proceeding. Similarly, we decline PJM's request to provide guidance on related matters.

⁴¹ 18 C.F.R. § 35.11 (2015).

⁴² *Central Hudson Gas & Electric Corporation, et al.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992), and *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993).

28. We disagree with PSE&G's arguments regarding the escalation index. The Agreement uses the Handy-Whitman index to measure the increase in costs from the date on which NTD provided the estimate and the date on which construction begins.⁴³ We find that the use of a standard industry index to account for the future rise in production costs is reasonable to account for the potential for inflation or other cost increases between the date on which an estimate is submitted and the date on which construction materials must be procured. PSE&G seems to suggest the use of an index is unjust and unreasonable because it may not track actual cost rises in the actual anticipated construction material and labor costs needed for NTD's project. PSE&G has not shown that the common practice, used by PJM itself, of relying on a construction index cost to measure such future cost rises results in an unreasonable escalation in costs, and we find that requiring NTD to track specific rises in each type of anticipated construction cost could be burdensome. PSE&G also suggests that NTD will be able to exceed the cost cap by moving costs to later periods when the index will be higher. PSE&G fails to explain how NTD can increase its rates by shuffling costs, since the escalation clause terminates when construction starts and NTD does not start collecting rates until the in-service date of its project.

29. We also disagree with PSE&G that excluding taxes and financing costs from the Construction Cost Cap is unreasonable. While the Commission does not require transmission developers to propose cost caps, the proposed Construction Cost Cap would add an additional level of protection for ratepayers by limiting the costs associated with the Project that NTD will seek to recover through its Annual Transmission Revenue Requirement. Therefore, we disagree with PSE&G that the exclusions make the cost cap unjust and unreasonable.⁴⁴

⁴³ The Cost Cap amount will be multiplied by a fraction, the numerator of which is the Escalation Index Number for the first January 1 or July 1 following the earlier of the date on which NTD notifies its construction contractor to begin work or December 1, 2017, and the denominator of which is the Escalation Index Number for July 1, 2014. Proposed Agreement, Schedule E, Section 1.2b.

⁴⁴ We emphasize that we are not determining the justness and reasonableness of NTD's transmission rates in this proceeding. NTD filed its rate application-- including justification supporting the justness and reasonableness of its proposed recovery of taxes and financing costs-- in Docket No. ER16-453-000. Our decision is confined to the particular service agreement terms and conditions being approved in the instant proceeding and does not constitute approval of NTD's transmission rate at issue in Docket No. ER16-453-000.

30. Regarding PSE&G's protest of the Uncontrollable Force provision, we find that the provision is similar in many ways to the Agreement's Force Majeure provision. For example, Uncontrollable Force and Force Majeure contain similar language regarding natural disasters, civil disturbances, and sabotage. In fact, in contrast to PSE&G's protest, we find the Uncontrollable Force provision may be more restrictive than the Agreement's Force Majeure provision in several respects, such as limiting the inclusion of impacts from laws and regulations to those originating from "material changes" thereof. The Uncontrollable Force provision additionally provides for a breach or default by a Transmission Owner under the interconnection agreements providing for the interconnection of NTD facilities to the PJM transmission system. In addition, the Force Majeure and Uncontrollable Force provisions serve different purposes and thus need not be identical. Specifically, the Force Majeure provision of the Agreement governs when a party shall not be responsible for non-performance, or considered in Breach or Default, under the Agreement,⁴⁵ while the Uncontrollable Force provision controls which costs will be excluded from the Construction Cost Cap. Finally, regarding PSE&G's arguments on negligence, the Agreement does not contain language allowing NTD to recover negligent costs above the cost cap. As noted above, NTD states the Uncontrollable Force provision only includes circumstances which could not have been caused by NTD, and the Agreement would require NTD to take steps to mitigate the effects of any Uncontrollable Force.⁴⁶

The Commission orders:

The proposed Agreement is hereby accepted, to be effective October 29, 2015, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁵ Proposed Agreement, Article 10 (Force Majeure).

⁴⁶ NTD Answer at 5-6.